made for trials before the registrar which would result in the loss of the right of appeal to the High Court.

For the above reasons, I am of the view that O 55 r 1(5) is ultra vires and the plaintiff is entitled to appeal to the High Court against the assessment of damages of the district judge made in chambers in the present case. There will be a declaration in terms of the application, with costs to be paid by the defendants.

Application allowed.

Solicitors: *NS Kang; Koh & Yang.*

Reported by *Mathavan Devadas*

Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)

HIGH COURT (SINGAPORE) - ORIGINATING MOTION NO 132 OF 1988
CHAN SEK KEONG J
15 MAY 1989

Conflict of Laws - Letter of request from foreign court for evidence to be taken and documents to be received in evidence - Minister issuing authorization to senior district judge to take such evidence - Delegation by Minister to senior district judge of power to appoint district judge or magistrate to take such evidence - Whether Minister had power to issue authorization - Whether delegation ultra vires - Whether Australia 'foreign State' under the Act - Extradition Act 1968, ss 43(1) & 46

Administrative Law - Certiorari - Application to quash Ministers's authorization on taking of evidence for foreign legal proceedings - Minister delegating appointment of district judge to take such evidence to senior district judge - Whether Minister had power to issue authorization - Whether delegation ultra vires - Extradition Act 1968, s 43(1) - Interpretation Act (Cap 1, 1985 Ed), s 30

Words and Phrases - 'Foreign State' - Extradition Act 1968, s 43(1) - Absurdity

This was an application by Elite Wood Products (Australia) Pty Ltd and Peter Bazos ('the applicants') for an order of certiorari to quash the authorization of the Minister of Law ('the Minister') given in writing ('the authorization') in exercise of his power under s 43(1) of the Extradition Act 1968 ('the 1968 Act'). Section 43 allowed the Minister to authorize a magistrate to take evidence for the purposes of a criminal matter pending in a court of a foreign state. The authorization was directed to the senior district judge, authorizing him or such other district judge or magistrate that he might nominate to take the evidence of certain persons and to receive certain documents as evidence (cumulatively 'the evidence') pursuant to a request from the Attorney General of Australia. This evidence was required for the prosecution in Australia of the applicants for certain offences. The senior district judge did not take the evidence himself but appointed another district judge to take the evidence. The applicants challenged the validity of the authorization on the grounds that under s 43, the Minister did not have the power to make the authorization; alternatively, that he had exceeded his power by delegating it to the senior district judge. The applicants argued that Australia is not a 'foreign State' as defined and moreover, there is no extradition treaty between Singapore and Australia. Furthermore, since Australia had been declared a Commonwealth country for the purpose of Part IV, it could not be a 'foreign State' under the same Act. The 1968 Act made a clear division between Commonwealth countries and a 'foreign State' in all its relevant provisions and these provisions, except for s 43, use both expressions whenever it is intended that they apply to both groups of territories. The legislative history of the 1968 Act and s 43 supported these arguments.

The senior state counsel argued that to apply the definition of 'foreign State' to s 43(1) would lead to absurdity and thus should not be done. If s 43(1) did not allow Singapore to render assistance to Commonwealth countries but only non-Commonwealth countries, it would result in absurdity as more stringent procedures would apply to Commonwealth countries than to non-Commonwealth countries. Given the legislative history and the purpose for which s 43 was enacted, the words 'foreign State' must be given its plain and ordinary meaning to refer to any sovereign state other than Singapore.

Held, allowing the application for order of certiorari:

(1) The contentions of the applicants were simple and straightforward and involve no assumption whatever as to the intention of Parliament in enacting s 43 of the Extradition Act 1968. They merely require the court to give effect to the plain words thereof while the contentions of senior state counsel require the court to say that Parliament did not mean what it said in s 43.

(2) There was nothing in s 43 which remotely suggests that the expression 'foreign State' as used therein has a meaning other than the defined meaning. The result of giving the expression its defined meaning does not result in any absurdity as generally understood by the courts. An absurdity is a result which is manifestly inconsistent with the terms or defeats the object of the section or the statute, or a result which is manifestly nonsensical.

(3) Giving the expression its defined meaning only leads to a result which is not absurd but, in the instant case, merely inconvenient to the Commonwealth of Australia. The argument that Singapore did not intend to deprive Commonwealth countries of the benefit of s 43 does not stand up to scrutiny.

(4) The argument that there is an extradition treaty between Singapore and Australia, and therefore Australia is a foreign State, has no merit. Since Singapore's agreement to the scheme is not binding in the contractual sense, there was no binding agreement. Even if there were an agreement, it would not be an agreement equivalent to a treaty since it did not create obligations under international law as treaties would.

(5) The maxim delegatus non potest delegare applied to the delegation of the Minister of the power under s 43 of the 1968 Act. Administrative efficiency or convenience is not a valid reason in law for the Minister or any decision-making body in whom a statutory power is vested to delegate such power.

(6) Also, s 43(1) of the Act 'does not authorize the taking of evidence but a magistrate to take the evidence' [sic]. Under the Interpretation Act, a power to appoint or name a person to have and to exercise any power may be effected by either appointing that person by name or by his office.

(7) Here, the senior district judge had nominated another district judge to take the evidence. The Minister accordingly did

delegate his power to make the appointment, which is not permitted by law.

(8) For the above reasons, the authorization was bad in law on both grounds alleged by the applicants. The application was allowed with costs and the authorization quashed.

[*Editorial Note*: The Attorney General has appealed to the Court of Appeal vide Civil Appeal No 45 of 1989.]

Cases referred to

1 *PP* v *Anthony Wee Boon Chye* [1965] 1 MLJ 189 (refd)
2 *Ng Sui Nam* v *Butterworth & Co (Publishers) Ltd* [1987] 2 MLJ 5 (refd)
3 *Panthalu* v *Ramnord Research Laboratories* [1966] 2 QB 173 (refd)
4 *Mangin* v *IRC* [1971] AC 739 (refd)
5 *No 20 Cannon St* v *Singer & Friedlander* [1974] Ch 229 (folld)

Legislation referred to

Evidence by Commission Act 1859 s 1
Evidence by Commission Act 1885 s 3
Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 s 7
Extradition Act 1870 s 24
Extradition Act 1873 s 5
Extradition Act 1968 s 43(1), 46
Foreign Tribunals Act 1856
Fugitive Offenders Act 1881
Interpretation Act (Cap 1, 1985 Ed) s 30
Extradition (Commonwealth Countries) Act 1966 [Aust] s 33AB(1)
Extradition (Foreign States) Act 1966 [Aust] s 27
Evidence (Proceedings in other Jurisdictions) Act 1975 [UK] s 8(2)
Fugitive Offenders Act 1967 [UK]

Tan Woon Tiang for the applicants.
A Govindarajalu (*Low Chai Chong* with him) for the Director of Public Prosecutions of the Commonwealth of Australia.
Fong Kwok Jen (*Tan Chee Meng* with him) for the Attorney General of Singapore.

Cur Adv Vult

Chan Sek Keong J: This is an application by Elite Wood Products (Australia) Pty Ltd and Peter Bazos (collectively called 'the applicants') for an order of certiorari to quash the authorization of the Minister of Law ('the Minister') given in writing on 23 May 1988 ('the authorization') in exercise of his power under s 43(1) of the Extradition Act 1968 ('the 1968 Act'). The authorization was in the following terms:

> The Extradition Act (Cap 103)
> Authorization under s 43(1)
>
> The Senior District Judge
> Subordinate Courts
> Upper Cross Street
> Singapore 0105
>
> Whereas the attached letter of request dated 8 April 1988 was received from the first assistant secretary, Criminal Law and Law Enforcement Division, Attorney General's Department, Canberra, Australia, for the evidence of certain persons to be taken and particularly, for certain documents now situate in the Republic of Singapore to be received in evidence.
>
> And whereas the evidence requested is for the purposes of a criminal matter pending before the local court of New South Wales which is not a matter relating to offences which are, by their nature or by reason of the circumstances in which they were alleged to have been committed, offences of a political character.
>
> Now therefore I, pursuant to s 43(1) of the Extradition Act (Cap 103) thereby authorize you or *such other district judge or magistrate as you may nominate* to take the evidence of the said witnesses as referred to in the letter of request and thereafter to submit the certified notes of the evidence and the documents received in evidence to me. (Emphasis added).
>
> Dated Singapore 23 May 1988
> (Sgd) EW Barker
> Minister of Law

Upon receipt of the authorization, the senior district judge himself did not proceed to take the evidence but, acting under its terms, appointed another district judge to take the evidence of the witnesses named in the letter of request, which evidence was required by the Australian government in connection with the prosecution in Australia of the applicants for certain offences under the Commonwealth Crimes Act 1914 and for forgery of documents deliverable to the Commonwealth.

The applicants have challenged the validity of the authorization on two main grounds: (1) the Minister did not have any power to make the authorization under s 43(1) of the Extradition Act 1968; and (2) if he did, he exceeded his power by delegating it to the senior district judge. The senior state counsel representing the Minister and counsel for the Commonwealth of Australia contend that the Minister had the power and that it was exercised properly.

The rival contentions on the first point concern the *extent* of the power of the Minister under s 43 of the 1968 Act. To determine which contention is correct, it is necessary to trace the legislative history of Parts II, III and IV of the 1968 Act and also s 43 as they originated from different sources of legislation for different purposes.

Extradition between Singapore and Commonwealth countries

Singapore was a British colony until 15 September 1963 when it became independent as a constituent state within the Federation of Malaysia. As a British colony, Singapore's arrangements relating to the surrender of fugitive offenders with other parts of the British Possessions (which expression will be used to describe Her Britannic Majesty's Dominions in its pre-1931 sense) were settled by the Imperial Parliament under the Fugitive Offenders Act 1881 ('the 1881 Act'). Both Australia and the Straits Settlements were British Possessions in 1881.

The scheme of the 1881 Act has been adequately summarized by Thompson LP in *PP* v *Anthony Wee Boon*

Chye[1] where the Federal Court of Malaysia in an appeal from the High Court of Singapore held that the 1881 Act and the Order in Council of 2 January 1918 (which grouped together certain British Possessions including British India, Ceylon, the Straits Settlements, the Federation of Malay States and Hong Kong) remained as part of the existing law of Singapore on 15 September 1963 even though Singapore ceased, politically, to be a British possession on that day. The court held that the expression 'British Possessions' in the 1881 Act must be given a geographical meaning drained of any content implying any political relationship between the United Kingdom and Singapore. The decision in *Anthony Wee*'s case[1] was followed by the Singapore Court of Appeal in *Ng Sui Nam* v *Butterworth & Co (Publishers) Ltd*[2] in relation to another Imperial statute, viz the Copyright Act 1914. The 1881 Act contained no provision for the taking of evidence of witnesses in one British Possession for use in any judicial proceedings in another British Possession.

Extradition between Singapore and a foreign state

Similarly, extradition arrangements between Singapore as a British colony and any foreign state were settled by the Imperial Parliament under the Extradition Acts of 1870 to 1935 ('the 1870-1935 Acts'). The 1870 Act was extended to the Straits Settlements pursuant to s 17 thereof by Order in Council dated 11 July 1877. In general, the scheme of the 1870 Act was similar to that of the 1881 Act in that it only applied in relation to certain specified offences, except that in the 1870 Act there was no right of extradition for offences of a political nature. In the 1870 Act, the expression 'foreign state' meant any sovereign state other than the United Kingdom and its possessions, ie the British Possessions.

Taking of evidence for criminal proceedings in foreign courts

The first Imperial statute which made it possible for the taking of evidence in the United Kingdom or any part of the British Possessions for criminal proceedings in the courts and tribunals of a foreign country (ie other than the United Kingdom and the British Possessions) was the 1870 Act which by s 24 extended the operation of the Foreign Tribunals Act 1856 ('the 1856 Act') to such proceedings. Section 24 provided as follows:

> The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Foreign Tribunals Evidence Act 1856, and all the provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal: Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

The object of the 1856 Act was to afford facilities for taking evidence in British Possessions in relation to civil and commercial matters only. For this purpose, the 1856 Act authorized the judges of certain superior courts in the United Kingdom and any of the British Possessions, on application being made to them on behalf of any foreign court 'before which any civil or commercial matter is pending', to attend before, and to be examined by, such persons as shall be named in the order, and the examiners were empowered to administer all necessary oaths.

The power conferred by s 24 of the 1870 Act was subsequently extended by s 5 of the Extradition Act 1873: s 5 provided for the taking of evidence in the United Kingdom and any part of the British Possessions for the purpose of any criminal matter in any court in a foreign state. Section 5 reads as follows:

> A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purpose of *any criminal matter pending in* any court or tribunal in *any foreign state*; and the police magistrate or justice of the peace upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition. (Emphasis added).
>
> ...
>
> Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

It is to be noted that the procedure for invoking the jurisdiction of the courts under s 5 of the 1873 Act was very different from the procedure provided by s 1 of the 1856 Act as extended to the 1870 Act by s 24 thereof. Under s 5 of the 1873 Act, the Secretary of State had the power to direct a police magistrate or a justice of the peace to take the evidence whereas under s 1 of the 1856 Act, the procedure was by way of an application to the court by the party who desired such evidence to be taken. The second point to note is that the 1870-1873 Acts applied only as between (i) the United Kingdom and the British Possessions and (ii) foreign states, and not amongst the United Kingdom and the British Possessions inter se, for which, the 1881 Act was the relevant statute.

Taking of evidence for criminal proceedings in British Possessions

The first Imperial statute which made it possible for the taking of evidence in the United Kingdom and any of the British Possessions for use in proceedings in another part of the British Possessions was also limited to civil matters only. This was the Evidence By Commission Act 1859 ('the 1859 Act') which, after reciting that it was expedient to afford facilities '*for taking evidence in, or in relation to, actions, suits, and proceedings pending before tribunals of Her Majesty's dominions, in places in such dominions out of*

the jurisdiction of such tribunals', went on to provide that whenever any court in the British Possessions should have authorized, by command, order or other process, the obtaining of the testimony of any witness out of its jurisdiction, in relation to any action, suit or proceedings pending in such court, certain judges enumerated in the Act were empowered to command the attendance of any witness living within the jurisdiction to attend before appointed commissioners, to order his examination and to give all necessary directions on the subject (see s 1). Here, the procedure to take the evidence was by way of commission. Section 1 of the 1859 Act was the counterpart of the 1856 Act (relating to foreign courts).

The 1859 Act was amended by the Evidence By Commission Act 1885 ('the 1885 Act') in two important respects: firstly, it extended, by s 3, the power to take evidence for use in *criminal proceedings* and secondly, the procedure was changed to enable the court or the chief judge to whom the commission was addressed to nominate another judge of the same court or a judge of an inferior court to take the evidence. The taking of evidence for use in criminal proceedings was therefore not by way of commission (notwithstanding the short title of the 1885 Act) but by an order from one court or judge to another court or judge. Section 3 of the 1885 Act laid down the procedure as follows:

> Where in any criminal proceeding a *mandamus or order* for the examination of any witness or person *is addressed, to any court, or to any judge of a court, in* India ..., or *the Colonies*, or elsewhere in Her Majesty's dominions, *beyond the jurisdiction of the court ordering the examination*, it shall be lawful for such court, or the chief judge thereof, or such judge, to nominate any judge of such court, or any judge of an inferior court, or magistrate within the jurisdiction of such first-mentioned court, to take the examination of such witness or person, and any deposition or examination so taken shall be admissible in evidence to the same extent as if it had been taken by or before the court or judge to whom the mandamus or order was addressed. (Emphasis added).

The Evidence By Commission Acts 1859 and 1885 were, by their terms, applicable to Singapore as a British colony. Like the Extradition Acts 1870-1935 and the Fugitive Offenders Act 1881, and the Foreign Tribunals Act 1856, the Evidence By Commission Acts 1859 and 1885 remained in full force and effect in Singapore as part of the existing laws of Singapore on 15 September 1963 when it ceased to be a British colony: see *PP* v *Anthony Wee Boon Chye*;[1] and continued to be in full force and effect in Singapore on 9 August 1965 when it became an independent sovereign republic: see *Ng Sui Nam* v *Butterworth & Co (Publishers) Ltd*,[2] in so far as the Malaysian Parliament had not legislated otherwise, in respect of such matters, for Singapore as a constituent state of the Federation.

Legal position in Singapore as at 9 August 1965

Thus, when Singapore became an independent sovereign republic, there was still a clear division in its written laws that were applicable vis-a-vis what were originally the British Possessions (but today geographically part of and generally known as the Commonwealth countries) and vis-a-vis foreign states in relation to matters of extradition and the taking of evidence for use in proceedings, both civil and criminal, before foreign courts and courts in Commonwealth countries. The legal position as at 9 August 1965 may be summarized as follows:

1 Extradition arrangements between Singapore and any foreign state were governed by the Extradition Acts 1870-1935.

2 Extradition arrangements between Singapore and what is now geographically a former British Possession (generally a Commonwealth country) were governed by the Fugitive Offenders Act 1881.

3 The taking of evidence in Singapore for use in criminal proceedings in a court in a foreign state (ie generally a non-Commonwealth country) was governed by s 5 of the Extradition Act 1873.

4 The taking of evidence in Singapore for use in criminal proceedings in a Commonwealth country was governed by the Evidence by Commission Act 1885 read with the Evidence by Commission Act 1859.

The 1966 Commonwealth scheme

From 26 April to 3 May 1966, the Commonwealth Law Ministers (including the Attorney General of Australia and the Minster of Law, Singapore) met in London ('the meeting') to review the arrangements for the extradition of fugitive offenders within the Commonwealth in the light of the constitutional changes which had taken place since the passing of the Fugitive Offenders Act 1881. A scheme ('the scheme') was formulated and agreed to. The following extract from the communique issued at the conclusion of this meeting explains the purpose of the scheme:

> The meeting considered that Commonwealth extradition arrangements should be based upon reciprocity and substantially uniform legislation incorporating certain features commonly found in extradition treaties, eg a list of returnable offences, the establishment of a prima facie case before return, and restrictions on the return of political offenders.
>
> The meeting accordingly formulated a scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be given to the scheme in each Commonwealth country. The scheme does not apply to Southern Rhodesia.

It is not necessary to set out the principles of the scheme here. But two observations need to be made: firstly, the meeting was concerned with the review of the Fugitive Offenders Act 1881 and *not* the Extradition Acts 1870-1935. Secondly, the scheme did not include any principle or guideline in relation to the taking of evidence of witnesses for use in or criminal proceedings in another Commonwealth country.

(a) Australian legislation

The Commonwealth of Australia gave effect to the scheme by enacting the Extradition (Commonwealth Countries) Act 1966 and repealing the Fugitive Offenders Act 1881. At the same time, the Commonwealth of Australia also enacted another statute along similar lines to deal with extraditions with foreign states, viz the Extradition (Foreign States) Act 1966 (which Act repealed the Extradition Acts 1870-1935). These two Acts, although containing similar provisions, make a clear division between extradition arrangements with Commonwealth countries on the one hand and with foreign states (ie other than Commonwealth countries) on the other hand. Singapore was declared a Commonwealth country for the purpose of the Extradition (Commonwealth Countries) Act 1966 in 1969.

In regard to the taking of evidence for use in criminal proceedings in Commonwealth courts, it is also relevant to note that (a) s 32AB of the Extradition (Commonwealth Countries) Act 1966 provides as follows:

> (1) Where a request is made by a declared Commonwealth country that evidence be taken in Australia for the purposes of a criminal proceeding in a court or tribunal of that country other than a proceeding relating to an offence that is, or that is by reason of the circumstances in which it is alleged to have been committed, an offence of a political character, the Attorney General may, by writing in accordance with a form prescribed for the purposes of this subsection, authorize the taking of the evidence.

and (b) that in relation to foreign states, the Extradition (Foreign States) Act 1966 contains a corresponding provision in s 27, with the expression 'foreign state' being substituted for 'declared Commonwealth country'. The legal position in Australia on this point is absolutely clear. The taking of evidence in Australia for use in criminal proceedings in the courts of Commonwealth countries and of foreign states is governed by two separate Acts.

(b) Singapore legislation - The Extradition Act 1968

Singapore gave effect to the scheme by enacting the Extradition Act 1968. Following the Commonwealth of Australia, Singapore also enacted new provisions to regulate the arrangements for the extradition of fugitive offenders to foreign States. However, Singapore did not follow the Australian model of having two statutes to regulate extradition arrangements with Commonwealth countries and foreign States separately. Instead, Singapore enacted the 1968 Act to cover both sets of arrangements. For this reason, the 1968 Act, by s 46, repealed the Extradition Acts 1870-1935 and the Fugitive Offenders Act 1881 at the same time. The Commonwealth of Australia was on 22 February 1969 declared a Commonwealth country in relation to Part IV thereof by subsidiary legislation No S52 of 1969.

The 1968 Act is divided into Parts I to VI. Part I deals with definitions and other preliminary matters. Part II deals with extradition *to* foreign States (an expression which is statutorily defined). Part III deals with extradition *from* foreign States. Part IV deals with extradition *to and from* declared Commonwealth countries (an expression which is also statutorily defined). Part V deals with extradition *to and from* Malaysia and Part VI deals with miscellaneous matters.

As the application before me does not concern extradition but the taking of evidence in Singapore for criminal proceedings in Australia, I do not propose to examine the provisions of Parts II, III, IV and V. It is however necessary to reproduce below (i) certain provisions in Part I and Part VI and in particular the definitions of 'declared Commonwealth country' and 'foreign State' and (ii) s 43(1). In s 2 of Part I:

(a) the expression 'declared Commonwealth country' as defined means:

> a country declared to be a Commonwealth country in relation to which Part IV applies.

(b) the expression 'extradition treaty' is defined as:

> a treaty or agreement made by Singapore with a foreign State relating to the extradition of fugitives, and includes any treaty or agreement relating to the extradition of fugitives made before 9 August 1965 which extends to, and is binding on, Singapore.

(c) the expression 'foreign State' is defined as:

> a foreign State between which and Singapore an extradition treaty is in force.

The last relevant provision is s 43 which provides as follows:

> (1) The Minister may, by notice in writing, authorize a Magistrate [which, as defined includes any district judge] to take evidence for the purposes of a *criminal matter* pending in a court or tribunal of a *foreign State* other than a matter relating to an offence that is, by its nature or by reason of the circumstances in which it is alleged to have been committed, an offence of a political character. (Emphasis added).

It is to be noted that s 43(1) refers specifically to criminal proceedings pending in a court or tribunal of a foreign State and makes no mention whatever to a declared Commonwealth country.

Taking of evidence for foreign courts

The next legislative development in Singapore concerning the taking of evidence for use in foreign courts and tribunals was the enactment of the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 ('the 1979 Act') to give effect to Singapore's accession to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1968. The 1979 Act replaced and repealed the Foreign Tribunals Act 1856, the Evidence By Commission Act 1859 and the Evidence By Commission Act 1885 in relation to civil proceedings. Unlike these Imperial statutes, and, prima facie, s 43(1) of the Extradition Act 1968, the 1979 Act applies uniformly to requests from Commonwealth and non-Commonwealth countries.

Section 7 of the 1979 Act is significant. It provided for the repeal of the said Imperial statute in these words:

> (1) The Foreign Tribunals Evidence Act 1856, and the Evidence by Commission Act 1859, shall cease to apply to Singapore.
>
> (2) The Evidence by Commission Act 1885, shall, *in so far as it applies to civil proceedings, cease to apply to Singapore.* (Emphasis added).

The effect of s 7 was that the taking of evidence for use in *civil* proceedings in courts in the United Kingdom and the former British Possessions is governed by the 1979 Act but that in relation to *criminal proceedings* in such courts, it left undisturbed the existing law, which was s 3 of the 1885 Act.

Current position in Singapore re extradition and taking of evidence

The current state of the law in Singapore in relation to the extradition of fugitive offenders and the taking of evidence in Singapore for use in Commonwealth and non-Commonwealth tribunals may be stated as follows:

1 Extradition arrangements between Singapore and a foreign State are governed by Parts II and III of the 1968 Act.

2 Extradition arrangements between Singapore and a Commonwealth country (excluding Malaysia) are regulated by Part IV of the 1968 Act.

3 Extradition arrangements between Singapore and Malaysia are regulated by Part V of the 1968 Act.

4 The taking of evidence for use in *civil* proceedings abroad, whether in a Commonwealth or non-Commonwealth country is governed by the 1979 Act.

5 The taking of evidence for use in *criminal proceedings* in Commonwealth courts and tribunals (ie those countries which were formerly British Possessions) continues to be governed by s 3 of the Evidence By Commission Act 1885 (see, by analogy, the decision of *Panthalu v Ramnord Research Laboratories Ltd*[3] where the Court of Appeal agreed that the Evidence by Commission Act 1859 rather than the Foreign Tribunals Evidence Act 1856 continued to apply to India in 1966 although India was then a Republic).

6 The taking of evidence for use in criminal proceedings in a foreign state is governed by s 43 of the 1968 Act.

Before I consider the submissions of counsel, it is relevant to note the way in which the United Kingdom has legislated on these two matters, ie the scheme and the taking of evidence. The United Kingdom gave effect to the scheme by enacting the Fugitive Offenders Act 1967 and repealing the Fugitive Offenders Act of 1881. Extradition arrangements between the United Kingdom and foreign states continued to be governed by the Extradition Acts 1830-1932. As regards the taking of evidence, the UK Parliament enacted the Evidence (Proceedings in Other Jurisdictions) Act 1975. This Act, as can be seen from its short title, applies to proceedings, civil and criminal. Sections 1, 2 and 3 deal with civil proceedings and s 5 applies ss 1 to 3 to criminal proceedings. The result is that a court in the United Kingdom has power to assist in obtaining evidence for civil and criminal proceedings in overseas courts. In the event, s 8(2) of the 1975 Act repealed the Foreign Tribunals Act 1856, the Evidence by Commission Act 1859, s 24 of the Extradition Act 1870, the Evidence by Commission Act 1885 and the Foreign Jurisdiction Act 1890.

It is clear from a comparison of the Australian, Singapore and the United Kingdom legislation on these two matters, that only Singapore, by enacting the 1979 Act in the manner it has done, has apparently chosen to retain s 3 of the Evidence By Commission Act 1885 as the machinery whereby Singapore courts may assist in obtaining evidence for criminal proceedings in the courts or tribunals of the United Kingdom, its possessions and countries which were formerly part of the British Possessions (ie Commonwealth countries). Why Singapore should have retained the machinery set up by an Imperial Act for this purpose and not a new scheme similar to that adopted by either Australia or the United Kingdom is somewhat puzzling. In the context of Singapore's status as an independent and sovereign state, the s 3 machinery is wholly inappropriate as it enables any superior court in any of the Commonwealth countries to issue a *mandamus or order* to the Chief Justice of Singapore to nominate any judge of the Supreme Court of Singapore or any district judge or magistrate to take such evidence.

I turn now to the arguments of counsel. The correctness of the summary I have given of the current state of the law in Singapore is not disputed by counsel. However, in relation to the sixth proposition, both senior state counsel representing the Minister of Law and counsel for the Director of Public Prosecutions, Australia, contend that the expression 'foreign State' therein includes Australia. I shall examine their arguments in due course.

Counsel for the applicants, on the other hand, contends that s 43(1) means when it says, ie the expression 'foreign State' has its defined meaning and that Australia is not a foreign State but a declared Commonwealth country. He says that s 43(1) cannot possibly apply to Australia for the following reasons:

(a) Australia is not a 'foreign State' as defined, and moreover, there is no extradition treaty between Singapore and Australia;

(b) in any case, since Australia has been declared a Commonwealth country for the purpose of Part IV, it cannot, at the same time, be a foreign State under the same Act;

(c) the 1968 Act makes a clear division between Commonwealth countries and foreign states in all its relevant provisions and these provisions, except for s 43, use both expressions whenever it is intended that they apply to both groups of territories, eg ss 2(2), (3), (4) and (5), 40, 41, 42; similarly the provisions of Parts II and III refer only to foreign states and the provisions of Part IV refer only to declared Commonwealth countries;

(d) the legislative history of the 1968 Act and s 43 supports this submission.

The submissions of senior state counsel (which have been adopted by counsel for the Director of Public Prosecutions, Australia) are as follows: (a) the expression 'foreign State' in the context of s 43(1) means any sovereign state other than Singapore, and alternatively (b) that Australia, even though declared a Commonwealth country, is also for the purpose of that section, a foreign State.

The arguments put forward by senior state counsel in support of proposition (a) are as follows:

(i) the definition of 'foreign State' applies unless the context otherwise requires (see s 2) and in s 43(1), the context so requires; it so requires, because otherwise it would lead to an absurdity;

(ii) the object of s 43(1) has no connection whatever with the extradition of fugitives which is permitted only if certain conditions are satisfied;

(iii) if s 43(1) does not allow Singapore to render assistance to Commonwealth countries but only non-Commonwealth countries, it would result in an absurdity as more stringent procedures apply to extradition to and from foreign states than extradition to and from Commonwealth countries, with which the arrangements are more liberal and flexible;

(iv) given the legislative history and the purpose for which s 43 was enacted, 'foreign State' must be given its plain and ordinary meaning to refer to any sovereign state other than Singapore: reference was made to the decision of *Mangin* v *IRC*[4] where the Privy Council restated the rules of interpretation which fell to be applied in that case, viz (a) words in a statute are to be given their ordinary meaning; (b) one has to look merely at what is clearly said; and (c) the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity is intended;

(v) as the 1968 Act was enacted in accordance with and to give effect to the scheme, which formulated a basis for substantially uniform legislation among Commonwealth countries, it could not be the intention of Parliament that Commonwealth countries should be excluded from the scope of s 43;

(vi) the possibility that a Commonwealth country may still be able to obtain assistance from Singapore in regard to the taking of evidence for criminal proceedings under s 3 of the Evidence By Commission Act 1885 does not affect or weaken the argument as parallel procedures for extradition also exist between Singapore and Malaysia;

(vii) in any case, as only s 3 of the 1885 Act remains in force in Singapore, if it remains in force at all, it is an 'inchoate' provision and therefore Parliament could not have intended to retain that provision to enable a Commonwealth country to seek the assistance of a Singapore court for the purpose of taking evidence for criminal matters;

(viii) the expression 'foreign State' in s 43 is capable of being used in its natural and ordinary sense, ie its non-defined sense and it is also used in a non-defined sense; this is supported by its use in the definition of the expression 'extradition treaty'; if the expression 'foreign State' as used in the expression 'extradition treaty' as defined means a foreign State as defined, it would lead to a circuitous and therefore absurd state of affairs;

(ix) the legislative history of s 43 supports the above arguments.

In support of proposition (b), senior state counsel contends that (i) Australia is a 'foreign State' within the meaning of that expression in the expression 'extradition treaty' as defined, and that (ii) on this basis, there is an extradition treaty between Singapore and Australia within the meaning of 'extradition treaty' as defined.

It can be seen from the above summary that the contentions of counsel for the applicants are simple and straightforward and involve making no assumption whatever as to the intention of Parliament in enacting s 43 of the 1968 Act in the form as it has done. They merely require the court to give effect to the plain words thereof whereas the contentions of senior state counsel require the court to say that Parliament did not mean what it has said in s 43 and also, as we shall see, did not intend what it has actually done. For this reason, it is more likely than not that the contentions of counsel for the applicants are correct. But it is necessary for me to consider the somewhat convoluted arguments of senior state counsel which I now proceed to do.

Firstly, there is nothing in the context of s 43, however one reads it, which remotely suggests that the expression 'foreign State' as used therein has a meaning other than its defined meaning. The result of giving the expression its defined meaning in s 43(1) does not result in any absurdity as generally understood by the courts. An absurdity is a result which is manifestly inconsistent with the terms or defeats the object of the section or the statute, or a result which is manifestly nonsensical. In my view, s 43

works perfectly well if 'foreign State' is given its defined meaning and it causes no injustice whatever to anyone. So interpreted, it leads to no absurdity but to a result which is, in the instant case, merely inconvenient to the Commonwealth of Australia. The principles of interpretation as restated in *Mangin* v *IRC*,[4] even if applicable to the present case, are of no assistance to senior state counsel. It should also be noted that in that case, the meaning of a statutorily defined expression was not in issue.

Secondly, the argument that Singapore, having agreed to, and did put into legislative effect the scheme, could not have intended to deprive declared Commonwealth countries of the benefit of s 43, does not stand up to scrutiny. The scheme was concerned solely with the extradition of fugitives and not with the taking of evidence for use in Commonwealth countries which participated in the scheme. The enactment by Australia of s 32AB of the Extradition (Commonwealth Countries) Act 1966 and the declaration of Singapore as a Commonwealth country under that Act did not necessarily require Singapore, in order to discharge its reciprocal obligations to Australia, to enact a corresponding provision in the 1968 Act as that concerned a matter outside the scheme. In any case, any reciprocity in that direction in favour of Australia was already, in 1966, fulfilled by the Evidence By Commission Acts 1859 and 1885 which were part of the law of Singapore at that time. Parliament must be deemed to have been aware of this legal position in 1968 when it enacted s 43 of the 1968 Act; in any case, it certainly was fully aware of such legal position in 1979 when it enacted s 7 of the 1979 Act which expressly repealed the Evidence By Commission Act 1859 and the Evidence By Commission Act 1885 in so far as those Acts applied to civil proceedings. In effecting such partial repeal, Parliament must have intended to preserve the 1885 Act in so far as it applied to *criminal proceedings*. Senior state counsel has pointed out in the course of his submissions that by repealing the whole of the 1859 Act and retaining only those provisions of the 1885 Act in relation to criminal proceedings, Parliament appeared to have emasculated (counsel described the 1885 Act standing by itself as 'inchoate') the power of the Singapore courts under s 3 of the 1885 Act as that power could not be exercised effectively in the absence of the power to command the attendance of witnesses to attend court for the taking of their evidence, a power which was vested in the courts by the repealed s 1 of the 1859 Act. For this reason, senior state counsel was constrained to argue that Parliament must have, in s 43 of the 1968 Act, empowered the courts to do what they could have done if s 1 of the 1859 Act had been retained as part of or together with s 3 of the 1885 Act. I cannot accept an argument which requires me to convert what was probably an inadvertence (ie the repeal of s 1 of the 1859 Act) into an intention of Parliament to transfer the machinery into s 43 of the 1968 Act.

The argument of circuitous reference between the expression 'extradition treaty' and 'foreign State' is, in my view, confused and confusing. Senior state counsel, by interpolating the definition of the second expression into the definition of the first expression, reads 'extradition treaty' to mean, in his words, 'a treaty or agreement made by Singapore with [a foreign state between which and Singapore an extradition treaty is in force] relating to the extradition of fugitives'. It is then argued that the circuitous requirement (of a treaty or agreement) can never be fulfilled as Singapore and that foreign State must first have an extradition treaty in force. In my view, this approach to the construction of a defined expression in a section (or, as here, in a definition) is of doubtful validity. In *No 20 Cannon St* v *Singer & Friedlander*[5] at p 240 Megarry J said:

> ... I do not think that statutory definitions require you bodily to substitute the definitions for the words defined so as to enable you as a matter of grammar to treat words in the definitions as being antecedents of words actually appearing later in the statutory provision. The definitions explain what the expressions mean in the statutory provision, but they remain outside that provision and for grammatical purposes leave unchanged in the provision the actual words that are there, even though they have become freighted with their statutory meanings. At all events, with no authority to assist me on the point, that is what appears to me to be the principle.

In the context of the instant case, I am of the view that counsel has dressed up his arguments as one of circuity and absurdity when it amounted to no more than saying that the statutory definition of 'extradition treaty' is tautologous. The definition may be slightly awkward because of its apparent tautology but it makes absolutely good sense. It should also be noted that the definition of 'foreign State' itself as 'a *foreign State* with ...' is also tautologous. It should have been 'a foreign *state* with ...', but notwithstanding, this definition also makes perfect sense. Furthermore, it is an inconsequential argument for these reasons: firstly, for the purpose of s 43(1), the relevant expression is 'foreign state' and not 'extradition treaty'. The latter expression does not appear in s 43(1). Secondly, even if the definition of 'extradition treaty' becomes circuitous or absurd unless the expression 'foreign State' therein refers to any sovereign state other than Singapore, then what follows is not that in the context of s 43 'foreign State' must mean a sovereign state other than Singapore, but that in the context of the definition of 'extradition treaty' a 'foreign State' has that meaning. The argument of senior state counsel on this point is a red herring.

In regard to the legislative history of s 43, the argument of senior state counsel runs as follows: although s 43 is indirectly derived from s 5 of the Extradition Act 1873, the expression 'foreign state' in s 5 was not defined; therefore the meaning of the expression 'foreign State' in s 43 of the 1968 Act should not in any way be affected by the meaning of the original expression. In my view, it is

clear beyond doubt that the expression 'foreign state' in s 5 of the 1873 Act meant any sovereign state other than the United Kingdom or any of the British Possessions. The 1873 Act was an integral part of the 1870 Act enacted to facilitate the extradition of fugitive offenders between the United Kingdom and the British Possessions on the one side and foreign states on the other side. Accordingly, the legislative history of s 43 supports the applicants' case rather than the reasoning of senior state counsel. There is one more bit of evidence which, in my view, concludes the point against senior state counsel. Both the first letters of the words 'foreign state' in s 5 of the 1873 Act were enacted in the lower case. If, as senior state counsel appears to have suggested, the expression might have been referable to any country, whether a British Possession or otherwise, other than the United Kingdom itself, and that the Singapore Parliament had intended to adhere to that meaning, s 43 should have been enacted with those words in the same format. Instead, Parliament has intentionally used the first letter in the word 'State' in the said expression in the capital case, *consistently* with the expression as statutorily defined. Since it has not been suggested that this is a printing error, it is, to my mind, the clearest evidence of the intention of Parliament.

Against the legislative background of the 1968 Act and the 1979 Act, there is, in my view, a simple if not obvious explanation for the wording of s 43 of the 1968 Act. It was enacted intentionally to apply to foreign States as defined because it was unnecessary to apply it to Commonwealth states, there being in existence at that time a statutory machinery for the same purpose.

I turn now to the alternative contention of senior state counsel that there is an extradition treaty as defined (ie including an agreement) between Singapore and Australia and therefore Australia is a foreign State. The argument here is that since Australia and Singapore have in turn given effect to the scheme by enacting uniform legislation and each has declared the other a Commonwealth country within the terms of its own legislation, an extradition agreement has been constituted between Singapore and Australia. This argument also has no merit. Firstly, senior state counsel has conceded that Singapore's agreement to the scheme is not a binding agreement in a contractual sense. That being the case, there is no other basis for a binding agreement. Reciprocity need not be necessarily based on any prior binding agreement between the two countries. Secondly, even if there were an agreement between Australia and Singapore, it would not be an agreement for the purpose of the definition of 'extradition treaty'. It is not disputed that the word 'agreement' used as an alternative to the word 'treaty' in the definition of extradition treaty refers to an agreement between states that creates obligations in international law and not under the domestic laws of the countries concerned. In other words, such an agreement has to be governed by international law as distinct from municipal law: see DP O'Connell, *International Law* at p 211. Therefore, the alternative argument must also fail.

Ultra vires

The next ground of challenge to the validity of the authorization is that the Minister has acted ultra vires in delegating his power of appointing a Magistrate (as defined) to the senior district judge. It is not disputed that the maxim *delegatus non potest delegare* applies to the exercise by the Minister of the power under s 43 of the 1968 Act. Senior state counsel contends however that the authorization was entirely proper as s 43 only requires the minister to authorize a magistrate, ie any Magistrate to take the evidence, which he has done, and that the nomination of another district judge by the senior district judge to take the evidence was an administrative act which was, in the circumstances, best left to the senior district judge to make as he was the administrative head of the Subordinate Courts and would know the best person to nominate. It is also suggested that so long as the Minister has authorized the taking of evidence, which he did, that would be sufficient to comply with s 43.

In my view, and here I also agree with counsel for the applicants, administrative efficiency or convenience is not a valid reason in law for the Minister or any decision-making body in whom a statutory power is vested to delegate such power. Secondly, s 43(1), unlike s 32AB of the 1966 Act (Australia), does not authorize *the taking of evidence but a magistrate to take the evidence*. Section 30 of the Interpretation Act (Cap 1, 1985 Ed) prescribes the mode in which a power to appoint or name a person to have and to exercise any power may be effected. The Minister may either appoint that person by his name or by his office. In the instant case, the authorization was effectively in two parts. The first part appointed the senior district judge, which was entirely correct, as it was an appointment of a person by his office, there being only one such office. The second part appointed 'such district judge or magistrate as you [the senior district judge] may nominate'. If the senior district judge had taken the evidence, the second part of the authorization would not have taken effect. But it took effect because the senior district judge nominated another district judge to take the evidence which the appointee proceeded to do until the proceedings were stayed by an order of this court. In my view, it is unarguable that on the facts the Minister did not make the appointment but the senior district judge did, in accordance with the direction of the Minister. This is not a case of the senior district judge recommending to the Minister the district judge to be appointed to take the evidence, and of the Minister accepting the recommendation and appointing the nominee. Accordingly, the Minister did delegate his power to make the appointment, which is not permitted by law.

For the above reasons, I am of the view that the authorization was bad in law on both the grounds advanced by counsel for the applicants. Accordingly, I allow this application with costs and order that the authorization be quashed.

Application allowed.

Solicitors: *Rodyk & Davidson.*

Reported by *Terence Tan Bian Chye*

Balfour Williamson (Singapore) Pte Ltd v Joyce Lee Yon Yin (Chee Ming & Anor, Third Parties)

Balfour Williamson & Co Ltd v Joyce Lee Yon Yin (Chee Ming & Anor, Third Parties)

HIGH COURT (SINGAPORE) - SUIT NOS 3740 OF 1980 AND 3959 OF 1980
LAI KEW CHAI J
5 MAY 1989

Banking - Guarantee, construction of - Scope of continuing guarantee - Whether variation in credit facility prejudiced guarantor and thus discharged guarantor from liability

Banking - Guarantee, construction of - Effect of failure to obtain cross guarantee - Whether guarantor released

Contract - Agreement of compromise - Indulgence given to principal - Whether plaintiff's rights reserved - Effect of guarantee - Whether guarantor discharged

The plaintiffs, Balfour Williamson & Co Ltd ('the UK company'), a company incorporated in the United Kingdom, is a confirming house. In the other action, the plaintiffs are a Singapore company ('the Singapore company') within the group. For a commission, they attended to the confirmation of purchases of their clients. They delivered the documents of title to the principal in exchange for usance bills of exchange duly accepted by the principal. The defendant and her brother were at all material times directors and significant shareholders of two companies, namely, Golden Lady (Malaysia) Sdn Bhd ('the principal') which is incorporated in Malaysia and Golden Pte Ltd, a company incorporated in Singapore. These companies had local factories. They required credit facilities to finance purchases. The plaintiffs' group of companies provided the finance which would have been repaid with commission and the usual charges by the principal after they had turned the goods into account. The facility letter was accepted by the principal on whose behalf Lee Lip Chong, the defendant's brother, signed the acceptance of the terms and conditions thereof. All the personal guarantees and the corporate guarantees were signed by the sureties concerned. Later, the plaintiffs agreed to increase the confirming facility to M$560,000 (£100,000). No fresh guarantees were sought nor obtained from the personal and corporate sureties.

It is common ground that 24 bills of exchange drawn by the plaintiffs and accepted by the principal were outstanding and they total the sums claimed in these proceedings. Most of the principal's acceptances were signed by the defendant. The principal failed to pay the bills on the due dates and the plaintiffs commenced these proceedings against the defendant in Singapore. At the same time, the plaintiffs also commenced proceedings in the High Court in Johore Bahru against the principal. The Johore Bahru proceedings were compromised and settled. The defendant personally attended the hearing and the negotiations which led to the compromise.

In these consolidated actions, the plaintiffs claimed against the defendant the sum, interest and 'extension commission' defined as 'additional commission' in the confirming facility letter entered into between the plaintiffs and the principal. In the second action, the UK Company, claimed against the defendant the sums and commission. The claims are made against the defendant as a surety under a guarantee in writing dated 5 April 1974 and signed by the defendant in favour of the plaintiffs. The defendant had joined two of the co-sureties as third parties for contribution and indemnity.

The defences common to both actions briefly summarized were as follows. Firstly, the defendant's guarantee did not cover the facilities granted by the plaintiffs to the principal. The defendant argued that the continuing nature of the guarantee would be spent and the guarantee would no longer operate once the original agreement for the confirming facilities, subject to variations of the limits and the other terms, had been terminated and a new agreement had come into existence. Secondly, the defendant, in the alternative, asserts that there has been a variation of a material term without her consent and that she was therefore discharged from all liability under the guarantee. It was said that it was part of the agreement that the plaintiffs would obtain a 'cross' guarantee from a related company to guarantee or indemnify the defendant, and the plaintiffs, in having failed to obtain it, had varied a material term of the principal agreement and had accordingly discharged the defendant as the surety. Thirdly, it was claimed that the plaintiffs had recently settled with the principal in an action in the High Court in Johore Bahru by reason of which the liability of the defendant has been discharged or extinguished.

Held, giving judgment to the plaintiffs:

(1) The court agreed with the construction of the guarantee as canvassed on behalf of the plaintiffs. The contention of the defendant is materially flawed in two respects. Firstly, it does not give any or any sufficient effect to the express provisions of the guarantee. The guarantee in this case extends to any liability arising out of the series of transactions within its scope and the series of transactions may be created by a contract or a series of contracts for the confirming transactions. Liability, if any, attaches under the guarantee so long as the transactions are of the type mentioned in the guarantee, and they are between any one or more companies within the group of companies contractually defined on the one hand and the principal obligor on the other, whether or not the transactions had arisen out of a single contract. Secondly, to accede to the construction put upon the guarantee by the defendant would be tantamount to ignoring the essential feature of the guarantee, which is to guarantee a series of future transactions as described. The changes in the 1977 facility letter were those commercially to be expected and they did not in any material respect alter the nature of the transactions as to take them out of the ambit of guarantee.

(2) The second construction point was the defendant's submission that the words 'cross guarantee of Golden Pte Ltd'